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TESTIMONY OF
ATTORNEY GENERAL GEORGE JEPSEN
BEFORE THE PUBLIC HEALTH COMMITTEE
March 7, 2017

Good morning Senators Gerratana and Somers, Representatives Steinberg and Srinivasan, and distinguished members of the Public Health Committee. I appreciate the opportunity to provide testimony about Senate Bill 442, *An Act Prohibiting Predatory Pricing of Pharmaceuticals*. This bill would amend the General Statutes "to make predatory pricing of pharmaceuticals an unfair trade practice." While I appreciate the intent of the proposal and concur with its co-sponsors that rising drug prices are an important public policy issue that must be addressed, I am concerned that the proposal, as drafted, would be difficult to implement and enforce.

No federal or Connecticut state laws currently regulate prescription drug prices. Pricing is opaque and different consumers and health plans typically pay different net prices for the same prescription drugs. Within this regulatory context, it would be very difficult to identify particular prices as "predatory". Doing so in an arbitrary manner could unjustifiably raise consumer expectations. It also could have unintended consequences, including drug shortages caused by manufacturers who choose to exit the Connecticut market because of fear or uncertainty about what conduct might subject them to civil liability.

Under the current federal regulatory regime, the only thing that has proven to put significant downward pressure on drug prices has been competition from generic drugs, which come to market if and when the branded drug's patent exclusivity ends. A number of factors, however, pose significant barriers to the entry of generic drugs into the market. Branded drug manufacturers have aggressively, and sometimes illegally, asserted patent infringement and other dubious legal claims to prevent competition from generic drug companies. In addition, evidence developed through an investigation initiated by my Office revealed that certain generic drug companies may have engaged in widespread illegal price-fixing schemes, which have suppressed competition for a number of generic drugs and likely caused significantly higher prices. That investigation has already resulted in a lawsuit by my Office against several generic drug manufacturers relating to several different generic drugs. Currently thirty-nine additional state attorneys general have joined that lawsuit. The investigation remains ongoing and likely will result in additional claims against additional generic manufacturers and additional generic drugs.

I therefore am asking the Committee to consider an alternative proposal that would strengthen my Office's authority under our state antitrust laws. In particular, I am asking the Committee to pass a law allowing my Office to assert claims for damages on behalf Connecticut

consumers who are "indirect purchasers" of drugs, medicines and medical devices against manufacturers who violate our state antitrust laws.

Connecticut is currently in the small minority of states that have not passed what is known colloquially in the legal field as an "*Illinois Brick* Repealer". *See* attached map detailing which states have passed or otherwise recognize an Illinois Brick Repealer. *Illinois Brick* was a 1977 United States Supreme Court case holding that only direct purchasers successfully can sue antitrust violators for damages under the federal antitrust laws. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Given that the Connecticut Antitrust Act (the "Act") provides that Connecticut's state courts will be "guided by interpretations" of antitrust law given by federal courts to federal antitrust statutes, the Attorney General and Connecticut consumers who are indirect purchasers cannot recover damages under the Act. Many states have successfully repealed the controlling effect of this case, hence the name "*Illinois Brick* Repealer." Indirect purchasers in Connecticut, however, have been unable to participate - - and thus obtain damages - - in many antitrust settlements.

When there is a conspiracy between manufacturers, typically only the wholesaler is a direct purchaser. Retailers and consumers are almost always indirect purchasers who cannot obtain damages under federal law, even though the wholesaler has often passed the artificial price increase on to its customer. The controlling case in Connecticut is *Vacco v. Microsoft*, 260 Conn. 59 (2002), which holds that indirect purchasers do not have standing under Connecticut antitrust law or our unfair trade practices statute to pursue a claim for monetary damages. *Vacco v. Microsoft* at 76-77. Indirect purchasers were held to be too remote.

Repealer legislation does not cause any new category of conduct to be considered unlawful – the conduct is already unlawful. All that changes is that the Connecticut state agencies and consumers who ultimately paid the artificially higher price will now be able to recover. As an example, in the current litigation against generic drug manufacturers I referenced above, the State of Connecticut is limited to obtaining injunctive relief, disgorgement and a civil penalty while a vast number of the other states with repealers can obtain compensatory damages for their respective state agencies and consumers.

Passing an *Illinois Brick* Repealer will permit my Office to recover damages for the state and Connecticut consumers who suffered as a result of illegal price fixing, regardless of whether the State of Connecticut or its consumers purchased products directly from manufacturers who fixed prices or through a wholesaler who passed the costs on to the consumers. Connecticut would join the majority of states that have adopted an *Illinois Brick* Repealer of one sort or another. While I believe it makes sense to pass a repealer that addresses all goods and services, the one I am proposing for this Committee would address only drugs, medicines and medical devices. The proposed language I have attached to my testimony would achieve this relatively

narrow, but important goal. I hope the Committee will strongly consider adopting this language in lieu of the proposed bill.

Thank you for your attention to this very important issue. Please feel free to contact me with any questions or concerns.

ATTORNEY GENERAL PROPOSED SUBSTITUTE LANGUAGE FOR SB 442, AN ACT PROHIBITING PREDATORY PRICING OF PHARMACEUTICALS

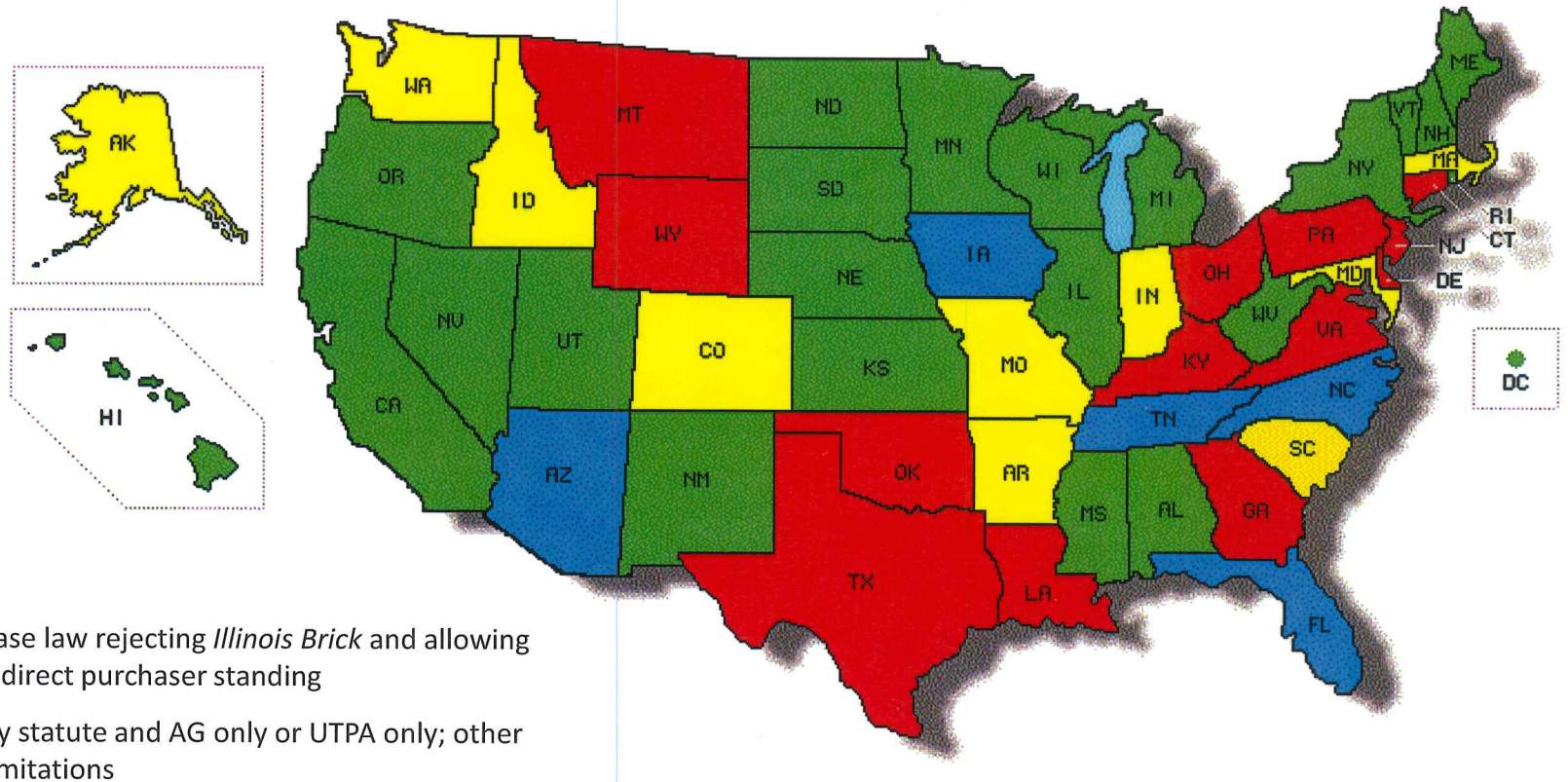
Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. (NEW) (Effective from passage) (a) In any action brought under subsection (c) of section 35-32 or section 35-35 of the general statutes, a defendant that sells, distributes, or otherwise disposes of any drug, medicine, or medical device as defined in section 201(h) of the Federal Food, Drug, and Cosmetic Act:

(1) May not assert as a defense that the defendant did not deal directly with the person on whose behalf the action is brought; and

(2) May prove, as a partial or complete defense against a damage claim, in order to avoid duplicative liability, that all or any part of an alleged overcharge ultimately was passed on to another person by a purchaser or seller in the chain of manufacture, production, or distribution who paid the alleged overcharge.

Illinois Brick Repealer by State



- Case law rejecting *Illinois Brick* and allowing indirect purchaser standing
- By statute and AG only or UTPA only; other limitations
- Statutory *Illinois Brick* repealer; AG and private plaintiff standing
- No indirect purchaser standing

Prepared by the Connecticut Attorney General's Office (2016)